

1995

State of Utah, Office of Recovery Services and Robyn K. Adams vs. Michael H. Mudd : Brief of Appellee

Utah Court of Appeals

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Michael H. Mudd; appellant.

Steven A. Combe; attorney for appellee.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Office of)	
Recovery Services and)	
ROBYN K. ADAMS,)	
)	
Plaintiffs and Appellees,)	
)	Case No. 950468-CA
vs.)	
)	
MICHAEL H. MUDD,)	Priority No. 15
)	
Defendant and Appellant.)	
)	

BRIEF OF APPELLEE

APPEAL FROM ORDER ENTERED JULY 19, 1995, BY
THE HONORABLE BRENT W. WEST, SECOND JUDICIAL
DISTRICT COURT, WEBER COUNTY, STATE OF UTAH

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STATE OF UTAH, Office of
Recovery Services and
ROBYN K. ADAMS,

vs.

Defendant and Appellant.

Priority No. 15

This Court has jurisdiction pursuant to Utah Code Ann.

STATEMENT OF ISSUES

2. Whether the trial court correctly concluded that Utah Code Ann. § 78-12-22 (Supp. 1995) did not bar the State of Utah from seeking a judgment for delinquent child support.

STANDARD OF REVIEW

Summary Judgment presents a question of law which this Court reviews for correctness, giving no deference to the trial court's determination. See Surety Life Insurance Co. v. Smith, 892 P.2d 1, 2 (Utah 1995); Travelers Insurance Co. v. Kearl, 896 P.2d 644, 646 (Utah Ct. App. 1995).

In determining whether the trial court correctly found that there were no genuine issues of material fact, the facts and all reasonable inferences are viewed in a light most favorable to the party opposing the motion. See Frontier Found. v. Layton Constr., 818 P.2d 1040 (Utah Ct. App. 1991).

Whether a statute of limitation has expired is a question of law reviewed for correctness, with no deference to the trial court's determination. See Gramlich v. Munsey, 838 P.2d 1131 (Utah 1992); O'Neal v. Division of Family Services, 821 P.2d 1139 (Utah 1991); Hansen v. Department of Fin. Insts., 858 P.2d 184 (Utah Ct. App. 1993).

STATEMENT OF THE CASE

On February 12, 1985, the Second Judicial District Court approved a Petition for Acknowledgment of Paternity, Order of Support, and Waiver, and signed a Judgment and Order Based on

Acknowledgment of Voluntary Paternity consistent with the terms of Defendant's Affidavit Acknowledging Paternity and Duty of Support, Consent to Judgment and Entry of General Appearance, signed by appellant Michael H. Mudd ("Mudd") on February 7, 1985 (R. 1 - 8).

On October 18, 1994, the State filed an Order to Show Cause seeking judgment for a child support delinquency, which was served upon Mudd on October 31, 1994 (R. 10-12, 16).

On December 22, 1994, Mudd filed a Motion for Order to Dismiss and Affidavit in Support of Motion for Order to Dismiss, alleging that the statute of limitations barred the State from seeking a judgment (R. 53-55). On or about January 4, 1995, the State filed a Memorandum in Opposition to Defendant's Motion to Dismiss (R. 64). On January 30, 1995, the District Court entered a memorandum decision denying Mudd's motion (R. 60). On February 22, 1995, the District Court entered Findings of Fact and Conclusions of Law and Order Denying Defendant's Motion to Dismiss (R. 76-79).

On or about May 4, 1995, the State of Utah filed a Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment, and Affidavit, seeking a child support judgment for the period of March 15, 1985 through April 30, 1995 (R. 139-144). On

June 20, 1995, the District Court entered a memorandum decision granting the State's Motion for Summary Judgment (R. 133-134). On July 19, 1995, the District Court entered Findings of Fact and Conclusions of Law and Order consistent with the Court memorandum decision (R. 155-160). On July 20, 1995, Mudd filed a Notice of Appeal (R. 161). On August 7, 1995, Mudd filed a Memorandum in Opposition to Plaintiff's Motion for Summary Judgment (R. 163-171).

DETERMINATIVE STATUTES

Utah Code Ann. § 78-12-22 (Supp. 1995) provides:

Within eight years an action:

- (1) upon a judgment or decree of any court of United States or of any state or territory within the United States.
- (2) to enforce any liability due or to become due, for failure to provide support or maintenance for dependent children.

Utah Code Ann. § 78-12-35 (1992) provides:

Where a cause of action accrues against a person when he is out of the state, the action may be commenced within the term as limited by this chapter after his return to the state. If after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

Utah Code Ann. § 30-3-10.6 (1995), provides in part:

(1) Each payment or installment of child or spousal support order, as defined by Subsection 62A-11-401(3), is, on and after the date it is due:

(a) a judgment with the same attributes and effect of any judgment of a district court, except as provided in Subsection (2);

(b) entitled, as a judgment, to full faith and credit in this and in any other jurisdiction; and

(c) not subject to retroactive modification by this or any other jurisdiction, except as provided in Subsection (2).

(2) A child or spousal support payment under a child support order may be modified with respect to any period which a petition for modification is pending, but only from the date notice of that petition was given to the obligee, if the obligor is the petitioner, or to the obligor, if the obligee is the petitioner.

STATEMENT OF FACTS

On February 12, 1985, the Second Judicial District Court approved a Petition for Acknowledgment of Paternity, Order of Support, and Waiver, and signed a Judgment and Order Based on Acknowledgment of Voluntary Paternity consistent with the terms of Defendant's Affidavit Acknowledging Paternity and Duty of Support, Consent to Judgment and Entry of General Appearance,

signed by appellant Michael H. Mudd ("Mudd") on February 7, 1985 (R. 1-8). The Judgment and Order declared Mudd to be the father of Michael Mudd Jr., born November 1, 1984, to Robyn K. Robinette (R. 4). The Judgment and Order required Mudd to provide for the education and other necessary expenses of the child and to pay the amount of one hundred dollars and 00/100 (\$100.00) per month for child support until the child reaches the age of majority; the monthly payments to be made on or before the 15th day of each month commencing with the month of March, 1985 (R. 4). The Judgment and Order also awarded two judgments, totaling \$1,600.00, for medical and hospital expenses, HL-A blood testing, and child support arrears (R. 4).

Shortly after paternity was established, Mudd left the State of Utah (R. 76-79). In January 1990, Mudd was incarcerated in the Twin Rivers Correction Center in Monroe, Washington, where he remains incarcerated (R. 20, 42, 44, 77).

On October 18, 1994, the State filed an Order to Show Cause seeking judgment for a child support delinquency, which was served upon Mudd on October 31, 1994 (R. 10-12, 16).

On December 22, 1994, Mudd filed a Motion for Order to Dismiss and Affidavit in Support of Motion for Order to Dismiss, alleging that the statute of limitations barred the State from

seeking a judgment (R. 53-55). On or about January 4, 1995, the State filed a Memorandum in Opposition to Defendant's Motion to Dismiss (R. 64-67). On January 30, 1995, the District Court entered a memorandum decision denying defendant's Motion to Dismiss (R. 60). On February 22, 1995, the District Court entered Findings of Fact and Conclusions of Law and Order Denying Defendant's Motion to Dismiss. The Court found that Mudd left the State of Utah shortly after paternity was established in March 1985, had resided in several different states, and had been incarcerated in the Twin Rivers Correction Center in the State of Washington since at least June 1993. The Court concluded that as a result of Mudd's absence from the State of Utah, Utah Code Ann. § 78-12-22 (1995) did not bar the State of Utah from seeking a judgment for any child support that had accrued under the Judgment and Order Based on Acknowledgment of Voluntary Paternity (R. 76-79).

On or about May 4, 1995, the State of Utah filed a Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment, and Affidavit, seeking judgment for the period of March 15, 1985 through April 30, 1995 (R. 139-144). On June 20, 1995, the District Court entered a memorandum decision granting the State's Motion for Summary Judgment (R. 133-134). On July 19,

1995, the District Court entered Findings of Fact and Conclusions of Law and Order consistent with the Court's memorandum decision (R. 155-160). On July 20, 1995, Mudd filed a Notice of Appeal (R. 161). On August 7, 1995, Mudd filed a Memorandum in Opposition to Plaintiff's Motion for Summary Judgment (R. 163).

SUMMARY OF ARGUMENT

Utah Code Ann. § 78-12-22 (Supp. 1995) provides for an eight year statute of limitation to enforce any liability due or to become due for failure to provide support or maintenance for dependant children. Utah Code Ann. § 78-12-35 (1992) provides that a statute of limitation is tolled for the period of time that a person is absent from the state after the cause of action accrues. In this case, it is undisputed that appellant was absent from the State of Utah for more than five years prior to the time this judgment was entered, having been incarcerated in the Twin Rivers Correction Center in Monroe, Washington (R. 20, 42, 44, 77). The statute of limitation was tolled during his absence. Therefore, section 78-12-22 would not bar the State from seeking a judgment for any support which accrued under the Judgment and Order Based on Acknowledgment of Voluntary Paternity.

On or about May 4, 1995, the State of Utah filed a Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment, and Affidavit, seeking a child support judgment for the period of March 15, 1985 through April 30, 1995 (R. 139-144).

Appellant failed to timely file a response to the State's Motion for Summary Judgment. Rule 56(e) of the Utah Rules of Civil Procedure provides that when a motion for summary judgment is made and properly supported, an adverse party may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The trial court properly determined from the evidence presented that there was no genuine issue of material fact and the State was entitled to judgment as a matter of law.

On August 7, 1995, Mudd untimely filed a Memorandum in Opposition to Plaintiff's Motion for Summary Judgment (R. 163-171).

Finally, Mudd improperly raises issues on appeal that were not ruled upon by the trial court. This includes Mudd's Petition to Modify Child Support, and Motion for Payment of Costs and Fees. It is premature for the Court to consider these issues.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY CONCLUDED THAT UTAH CODE ANN. § 78-12-22 (SUPP. 1995) DID NOT BAR THE STATE OF UTAH FROM SEEKING A JUDGMENT FOR THE CHILD SUPPORT DELINQUENCY.

Utah Code Ann. § 78-12-22 (Supp. 1995) provides the following statute of limitation:

Within eight years an action:

(1) upon a judgment or decree of any court of the United States or of any state or territory within the United States.

(2) to enforce any liability due or to become due, for failure to provide support or maintenance for dependant children.

Section 78-12-22 is not a bar to any action brought to enforce a child support liability which accrued for a period of eight years prior to the initiation of an action. In this case, the State of Utah filed its Motion for Order to Show Cause with the Court on October 4, 1994. Therefore, the statute of limitation would not apply to any support which accrued after October 5, 1986. The only support that would be subject to the statute of limitation would be support that accrued between March 15, 1985 and October 4, 1986, a period of approximately 1 year and 7 months.

Utah Code Ann. § 78-12-35 (1992) provides that a statute of

limitation is tolled as follows:

Where a cause of action accrues against a person when he is out of the state, the action may be commenced within the term as limited by this chapter after his return to the state. If after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

(emphasis added).

Shortly after paternity was established, Mudd left the State of Utah (R. 76-79). Mudd has been incarcerated in the Twin Rivers Correction Center in Monroe, Washington, since January 1990 (R. 20, 42, 44, 77). It is well established in this jurisdiction that the time period of defendant's absence can be added to the limitation period. See Keith-O'Brien Co. v. Snyder, 169 P. 954 (Utah 1917). In other words, the time period that Mudd was absent from the State well exceeded 1 year and 7 months, and therefore any past due support that accrued between March 15, 1985 and October 4, 1986, would also not be subject to the statute of limitation.

POINT II

THE TRIAL COURT CORRECTLY CONCLUDED THAT THERE EXISTED NO GENUINE ISSUE OF MATERIAL FACT AND THE STATE OF UTAH WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Rule 56 of the Utah Rules of Civil Procedure provides in part:

(a) **For claimant.** A party seeking to recover upon a claim ... may, at any time after the expiration of 20 days from the commencement of the action ... move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

. . . .

(c) **Motions and proceedings thereon.** ... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

A "major purpose of summary judgment is to allow the parties to pierce the pleadings to determine whether there is a genuine issue of fact." Webster v. Sill, 675 P.2d 1170, 1172 (Utah 1983).

The State of Utah initiated the current support collection action by serving Mudd with a Order to Show Cause seeking judgment for a child support delinquency (R. 10-12, 16). In response to the Order to Show Cause, Mudd filed a Motion for Order to Dismiss and Affidavit in Support of Motion for Order to

Dismiss, alleging that the statute of limitation barred the State from seeking a judgment (R. 53-55). On February 22, 1995, the District Court entered Findings of Fact and Conclusions of Law and Order Denying Defendant's Motion to Dismiss. The Court specifically found that as a result of Mudd's absence from the State of Utah, section 78-12-22 would not bar the State of Utah from seeking a judgment for any support that accrued under the Judgment and Order Based on Acknowledgment of Voluntary Paternity (R. 76-79).

On or about May 4, 1995, the State of Utah filed a Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment, and Affidavit, seeking judgment for the period of March 15, 1985 through April 30, 1995 (R. 139-144).¹

In support of its motion, the State alleged that on February 12, 1985, the Second Judicial District Court approved a Petition for Acknowledgment of Voluntary Paternity, Order of Support, and Waiver, and signed a Judgment and Order Based on Acknowledgment of Paternity consistent with the terms of Defendant's Affidavit Acknowledging Paternity and Duty of Support, Consent to Judgment and Entry of General Appearance signed by Mudd on February 7,

¹ Mudd apparently received the Motion for Summary Judgment on May 8, 1995 (R. at 166).

1985 (R. 1 - 8). The Judgment and Order declared Mudd to be the father of Michael Mudd Jr., born November 1, 1984, to Robyn K. Robinette (R. 4). The Judgment and Order required Mudd to "provide for the education and other necessary expenses of the child(ren) and to pay the amount of one hundred dollars and 00/100 (\$100.00) per month as and for child support...commencing with the month of March, 1985" (R. 4).

According to Utah Code Ann. § 30-3-10.6 (1995),

(1) Each payment or installment of child or spousal support order, as defined by Subsection 62A-11-401(3), is, on and after the date it is due:

(a) a judgment with the same attributes and effect of any judgment of a district court, except as provided in Subsection (2);

(b) entitled, as a judgment, to full faith and credit in this and in any other jurisdiction; and

(c) not subject to retroactive modification by this or any other jurisdiction, except as provided in Subsection (2).

(2) A child or spousal support payment under a child support order may be modified with respect to any period which a petition for modification is pending, but only from the date notice of that petition was given to the obligee, if the obligor is given to the petitioner, or to the obligor, if the obligee is petitioner.

Each payment or installment of child support under the Judgment and Order Based on Acknowledgment of Voluntary Paternity

became a monthly statutory judgment, not subject to retroactive modification, on and after the date it was due. See Thornblad v. Thornblad, 849 P.2d 1197 (Utah Ct. App. 1993); Crockett v. Crockett, 836 P.2d 818 (Utah Ct. App. 1992).

The State of Utah, Department of Human Services, Office of Recovery Services, has been responsible for support enforcement in this case since its inception. Therefore, when the State filed its Motion for Summary Judgment, a representative of that agency signed an affidavit indicating that no ongoing support payments were made to the agency between March 1985 and April 1995.² Though the affidavit contained a minor error, Mudd did not object to the affidavit and is deemed to have waived his opposition to any evidentiary defect thereof.³

² The State acknowledges that due to an inadvertent error the defendant was not properly given credit for some diminutive ongoing support payments. This error would have been readily discovered had Mudd simply timely filed a response to the State's Motion for Summary Judgment. Mudd has now been given credit for all payments made.

Mudd also alleges that he was not credited for tax refund intercepts made in 1985 and 1994. In support, Mudd submits a document from the Internal Revenue Service never raised before the trial court, not of record, and not properly before the appellate court. Nonetheless, for the benefit of the Court, the State notes that any refunds intercepted would have first been applied toward the oldest existing judgments, presumably the two judgments entered in the Judgment and Order Based on Acknowledgment of Voluntary Paternity.

³ In Franklin Financial v. New Empire Dev. Co., 659 P.2d 1040, 1044 (Utah 1983), the Utah Supreme Court held that "on a motion for summary judgment, an opposing party fails to move to strike defective affidavits, he is deemed to have waived his opposition to whatever evidentiary defects may exist." citing Howick v. Bank of Salt Lake, 498 P.2d 352 (Utah 1972); Fox v.

Mudd failed to timely file a response to the State's Motion for Summary Judgment.⁴ Rule 56(e) of the Utah Rules of Civil Procedure provides in part, "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." (Emphasis added)

Rule 56 does not always mandate that the non-moving party respond in order to avoid judgment against him, since the trial court must still determine that judgment is "appropriate". See Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered, 681 P.2d 1258 (Utah 1984); Olwell v. Clark, 658 P.2d 585 (Utah 1982). Nonetheless, the Utah Supreme Court issued the following caution:

Thus when a party opposes a properly supported

Allstate Insurance Co., 453 P.2d 701 (Utah 1969); see also Frisbee v. K & K Constr., 676 P.2d 387, 389, 390 (Utah 1984).

⁴ Appellant did not file his Memorandum in Opposition to Plaintiff's Motion for Summary Judgment until August 7, 1995, more than 3 months after the State filed its Motion for Summary Judgment and more than two weeks after filing his Notice of Appeal.

motion for summary judgment and fails to file any responsive affidavits or other evidentiary materials allowed by Rule 56(e), the trial court may properly conclude that there are no genuine issues of fact unless the movant's affidavit affirmatively discloses the existence of such an issue.

Franklin Financial, 659 P.2d at 1044.

The trial court properly determined from the evidence presented that there existed no genuine issues of material fact. Once the trial court determined that summary judgment was appropriate, the actual amount of judgment became a simple mathematical computation.⁵

On August 7, 1995, Mudd untimely filed a Memorandum in Opposition to Plaintiff's Motion for Summary Judgment. Even if Mudd's response had been timely filed, summary judgment would have remained appropriate, though the amount of judgment possibly adjusted.

Mudd's memorandum was not supported by any affidavits and included primarily unsupported and false allegations, and references to evidence not admissible or not of record. Rule 56(e) provides that, "[a]n adverse party may not rest upon the

⁵ Judgment was entered in the amount of \$12,150.00 for the period of March 15, 1985 and April 30, 1995, a total of 121 ½ months at the rate of \$100.00 per month.

mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e), Utah Rules of Civil Procedure.

The only genuine issue of fact included in Mudd's memorandum was whether he had been given credit for some minor ongoing support payments. If Mudd had simply timely filed a response to the Motion for Summary Judgment, this would have been undisputed.⁶ Given the opportunity, the State would have filed an amended affidavit showing the payments had been made, and this fact would no longer have been at issue. Therefore, this fact would not have prevented the court from properly entering summary judgment, though it may have slightly affected the amount of judgment.

POINT III

ISSUES NOT PRESENTED TO THE TRIAL COURT FOR DECISION ARE NOT REVIEWABLE ON APPEAL.

Mudd improperly raises issues on appeal that were not ruled

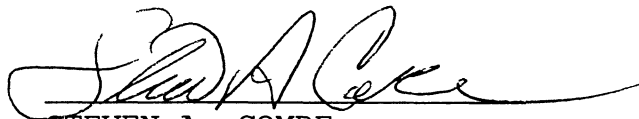
⁶ See *Supra* footnote 2. Mudd also refers to an inconsistency between the judgment amount sought in the State's Motion for Summary Judgment and correspondence received from the Office of Recovery Services. Any inconsistency is due primarily to a erroneous presumption by the agency that the statute of limitation was applicable.

upon by the trial court. This includes Mudd's Petition to Modify Child Support, and Motion for Payment of Costs and Fees. This Court has held that "when there is no indication in the record on appeal that the trial court reached or ruled on an issue, this Court will not undertake to consider the issue on appeal." Broberg v. Hess, 782 P.2d 198 (Utah Ct. App. 1989) (citing State v. Pacheco, 778 P.2d 26 (Utah Ct. App. 1989)); see also Traynor v. Cushing, 688 P.2d 856, 857 (Utah 1984).

CONCLUSION

Based on the foregoing, the State of Utah respectfully requests that this Court affirm the summary judgment entered in its favor.

DATED this 19th day of March, 1996.



STEVEN A. COMBE
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF DELIVERY

I hereby certify that cause to be delivered two copies of the foregoing Appellee's Brief to the Appellant, c/o Twin Rivers Correction Center, P.O. Box 888, Monroe, WA 98272, on this 19th day of March, 1996.

A handwritten signature in dark ink, appearing to read 'Steven A. Combe', written over a horizontal line.

STEVEN A. COMBE
Assistant Attorney General
Counsel for Appellee

ADDENDUM

30-3-10.6. Payment under child support order — Judgment.

(1) Each payment or installment of child or spousal support under any child support order, as defined by Subsection 62A-11-401(3), is, on and after the date it is due:

- (a) a judgment with the same attributes and effect of any judgment of a district court, except as provided in Subsection (2);
- (b) entitled, as a judgment, to full faith and credit in this and in any other jurisdiction; and
- (c) not subject to retroactive modification by this or any other jurisdiction, except as provided in Subsection (2).

(2) A child or spousal support payment under a child support order may be modified with respect to any period during which a petition for modification is pending, but only from the date notice of that petition was given to the obligee, if the obligor is the petitioner, or to the obligor, if the obligee is the petitioner.

(3) For purposes of this section, “jurisdiction” means a state or political subdivision, a territory or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(4) The judgment provided for in Subsection (1)(a), to be effective and enforceable as a lien against the real property interest of any third party relying on the public record, shall be docketed in the district court in accordance with Sections 78-22-1 and 62A-11-311.

History: C. 1953, 30-3-10.6, enacted by L. 1987, ch. 117, § 1; 1988, ch. 1, § 3; 1988, ch. 203, § 1; 1989, ch. 62, § 1; ch. 115, § 1.

NOTES TO DECISIONS

ANALYSIS

Retroactive modification.
Cited.

Retroactive modification.

The general rule is to prohibit retroactive modification of family support obligations; thus temporary support orders may not be retroactively modified. *Whitehead v. Whitehead*, 836 P.2d 814 (Utah Ct. App. 1992).

Cited in *McReynolds v. McReynolds*, 787 P.2d 530 (Utah Ct. App. 1990); *Adelman v. Adelman*, 815 P.2d 741 (Utah Ct. App. 1991); *Crockett v. Crockett*, 836 P.2d 818 (Utah Ct. App. 1992); *Thornblad v. Thornblad*, 849 P.2d 1197 (Utah Ct. App. 1993); *Nunley v. Brooks*, 247 Utah Adv. Rep. 38 (Utah Ct. App. 1994).

COLLATERAL REFERENCES

A.L.R. — Spouse’s right to set off debt owed by other spouse against accrued spousal or child support payments, 11 A.L.R.5th 259.

30-3-11. Repealed.

Repeals. — Section 30-3-11 (L. 1957, ch. 55, § 2), declaring a public policy to foster marital and family relationships, was repealed by Laws 1961, ch. 59, § 2.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-20; L. 1995, ch. 20, § 156.

Amendment Notes. — The 1995 amendment, effective May 1, 1995, substituted “Sections 78-12-18 and 78-12-19” for “The two preceding sections” at the beginning of the section;

subdivided the existing single sentence into two sentences by deleting “but all” following “accrues” and adding “All” before “such”; and substituted “Section 78-12-21” for “the next preceding section” at the end of the section.

ARTICLE 2

OTHER THAN REAL PROPERTY

78-12-22. Within eight years.

Within eight years an action:

(1) upon a judgment or decree of any court of the United States, or of any state or territory within the United States.

(2) to enforce any liability due or to become due, for failure to provide support or maintenance for dependent children.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-22; L. 1975, ch. 96, § 26; 1992, ch. 30, § 177.

Amendment Notes. — The 1992 amendment, effective April 27, 1992, made stylistic changes.

78-12-23. Within six years — Mesne profits of real property — Instrument in writing — Distribution of criminal proceeds to victim.

NOTES TO DECISIONS

ANALYSIS

Breach of contract.
Running of statute.
— Reformation of agreements.

Breach of contract.

When a contract for the sale of land provided no remedy in the event of the seller's default or refusal to perform, the buyer's right to recover money paid was not founded upon a written instrument, but rather upon an implied right to recover; therefore, the four-year statute of limitations in § 78-12-25(1) applied, and the trial

court erred in concluding that the buyer's claim fell within the six-year period of this section. *McKean v. McBride*, 884 P.2d 1314 (Utah Ct. App. 1994).

Running of statute.

— Reformation of agreements.

Claim for reformation of 1975 agreements was barred by Subsection (2) of this section, requiring actions based on a written contract to be brought within six years. *United Park City Mines Co. v. Greater Park City Co.*, 870 P.2d 880 (Utah 1993).

78-12-25. Within four years.

NOTES TO DECISIONS

ANALYSIS

Breach of fiduciary duty.
Discovery rule.
Equitable actions.
Federal civil rights actions.
Land contract.
Negligent employment.
Personal injuries.
Product liability.
Relation back of complaints.
Running of statute.

Tax paid under protest.
Tolling.
— Class actions.
Cited.

Breach of fiduciary duty.

Claim against parties for inducing, aiding, and abetting mining corporations in breaching their fiduciary duty was dismissed since the acts complained of occurred more than four years prior to the instigation of the lawsuit. *United Park City Mines Co. v. Greater Park*

(b) Subsection (a) provides for actions not yet barred, and also acts retroactively to permit actions under this section that are otherwise barred.

(2) As used in this section, "asbestos" means asbestiform varieties of:

- (a) chrysotile (serpentine);
- (b) crocidolite (riebeckite);
- (c) amosite (cummingtonite-grunerite);
- (d) anthophyllite;
- (e) tremolite; or
- (f) actinolite.

History: C. 1953, 78-12-33.5, enacted by L. 1988, ch. 208, § 2.

Effective Dates. — Laws 1988, ch. 208 be-

came effective on April 25, 1988, pursuant to Utah Const., Art. VI, Sec. 25.

78-12-34. Repealed.

Repeals. — Section 78-12-34 (L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-34), providing that there is no limitation in actions to recover

bank deposits of money or property, was repealed by Laws 1981, ch. 16, § 1.

ARTICLE 3

MISCELLANEOUS PROVISIONS

78-12-35. Effect of absence from state.

Where a cause of action accrues against a person when he is out of the state, the action may be commenced within the term as limited by this chapter after his return to the state. If after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-35; 1987, ch. 19, § 4.

NOTES TO DECISIONS

ANALYSIS

"Absence" from state.
 — Nonresident motorists.
 Applicability of section.
 — Nonresidents.
 — Personal representative of estate.
 Burden of proof.
 Computation of time.
 — Periods of absence.
 Construction of section.
 — Strict.
 Foreign corporation.
 — Pleadings and evidence.
 Laches.
 — Accounting.
 Purpose of section.

Residence within state.
 — Continual.
 — Proof of presence.
 — Defendant's family.
 — Statute tolled.

"Absence" from state.

— Nonresident motorists.

Nonresident motorists were not "absent" from the state so as to toll running of statute of limitations, although they left state immediately after automobile collision and remained without state, as they had an agent in person of secretary of state upon whom process could have been served. *Snyder v. Clune*, 15 Utah 2d 254, 390 P.2d 915 (1964).